

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION IV

CACR 05-1015

January 24, 2007

KIMBERLY MEDLING
APPELLANT

AN APPEAL FROM JACKSON
COUNTY CIRCUIT COURT
[CR-2003-110]

V.

HON. HAROLD ERWIN, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED; MOTION TO BE
RELIEVED GRANTED

This is a no-merit appeal from the revocation of appellant Kimberly Medling's probationary sentence. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Arkansas Supreme Court Rule 4-3(j)(1), Medling's counsel filed a petition to withdraw, asserting that an appeal in this case would be frivolous. We ordered rebriefing because counsel's original brief did not address the ultimate decision to revoke Medling's probation.¹ Counsel has rebriefed the case and lists all rulings adverse to Medling and explains why each adverse ruling does not constitute a meritorious ground for reversal. In accordance with Arkansas

¹See *Medling v. State*, 2006 WL 1756883, CACR 05-1015 (not designated for publication).

Supreme Court Rule 4-3(j)(2), Medling was furnished with a copy of counsel's original brief but chose not to file any *pro se* points; the Arkansas Supreme Court Clerk's office was unable to locate Medling to provide her a copy of counsel's substituted brief. Thus, there are no *pro se* points for this court to consider, and accordingly, the State filed no responsive brief. We affirm the revocation of Medling's probation and grant counsel's motion to be relieved.

Medling was placed on forty-eight months' probation in Jackson County in August 2003 after pleading guilty to possession of a controlled substance, a Class C felony. Among other things, the conditions of her probation required her to report as directed to her probation officer and to pay fines of \$1,400, at the rate of \$30 per month, and required her to keep her probation officer informed of her address. On April 26, 2004, the State filed a revocation petition, alleging that Medling violated these conditions of her probation. The State also noted that Medling had been turned down for supervision in Lawrence and Izard counties.

In May 2004, Medling appeared in court on the petition to revoke and her probation was "reinstated" at that time. In addition, her probation officer, Ray Marshall, was ordered by the trial judge to transfer Medling's case to Izard County. The trial court also ordered that Medling's past-due fees be waived. However, Marshall could not transfer Medling's probation until the fee waiver "went into the system" which Marshall said took "a couple of months." He thereafter sent the transfer request to Kenny Kendricks, an Izard County

probation officer, who sent the file back three months later (apparently after March 2005) because Kendricks was unable to get Medling to report in IZARD County. Marshall subsequently requested a warrant against Medling for absconding.

The revocation hearing was held on July 27, 2005. Two witnesses testified: Marshall and Medling. Marshall testified that Kendricks's file indicated that Medling failed to report in IZARD County from December 2004-March 2005. Marshall also testified that in January or February 2005, Medling pleaded guilty to a violation of the Arkansas Hot Check Law in IZARD County. He further explained that even though Medling's probationary fees were waived, she still owed the court \$1,400 in fines, for which she had never made any payment.

Medling said that she "completely forgot" about her outstanding fines but also said that she believed the waiver of her fees also waived the obligation to pay her fines. She said that she contacted her probation officer until January 2005 but that the last time she telephoned her probation officer, he "hollered" at her on the phone, so she "gave up" contacting him after that.

She also testified that she failed to report because the probation office was thirty to forty-five miles from where she lived, she did not have a vehicle, and she could not get a ride to the office. Medling said she was unable to get her housing assistance transferred so that she would be closer to the probation office. She finally obtained transportation in April but the petition to revoke had already been filed. Medling maintained that she currently had dependable transportation, in the form of her boyfriend's friend, and that she would report

as ordered.

She admitted that she wrote “hot checks” to pay for medicine and groceries, for which she received a suspended sentence and was ordered to pay restitution. She also explained that she has a mental disability and that she has been diagnosed with bi-polar depression and post-traumatic-stress syndrome. Medling asserted that she has appealed her denial of disability benefits and plans to pay her fines if she receives backpay for disability. She said that she had “stayed clean for two years” and did not deserve to go to prison because she is poor.

The trial court revoked Medling’s sentence but did not specify which term or terms of her probation that it determined she had violated. It ordered her to serve twenty-four months in a regional punishment facility.

Counsel may file a no-merit brief and request to withdraw as counsel if, after a conscientious examination of the record, he believes that an appeal would be wholly frivolous. *Anders, supra*. In so doing, counsel must file a brief discussing all adverse rulings that might arguably support the appeal and must explain why each adverse ruling is not a meritorious ground for reversal. *Eads v. State*, 74 Ark. App. 363, 47 S.W.3d 918 (2001). This court is bound to perform a full examination of the proceedings as a whole to decide if an appeal would be wholly frivolous. *Campbell v. State*, 74 Ark. App. 277, 47 S.W.3d 915 (2001).

There were no objections raised during the probation hearing; as such, the only

adverse ruling for this court to consider is the decision to revoke Medling's probation. The ultimate decision to revoke probation is an adverse ruling that must be addressed by counsel seeking to withdraw from representation. *See generally, Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001); *Brown v. State*, 85 Ark. App. 382, 155 S.W.3d 22 (2004).

To revoke probation or a suspension, the circuit court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. Ark. Code Ann. § 5-4-309(d) (Supp. 2006); *Haley v. State*, ___ Ark. ___, S.W.3d ___ (Oct. 4, 2006). The State bears the burden of proof, but need only prove that the defendant committed one violation of the conditions. *Haley, supra*. A defendant appealing from a revocation determination has the burden of showing that the trial court's findings are clearly against the preponderance of the evidence. *Haley, supra*. Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. *Lamb v. State*, 74 Ark. App. 245, 45 S.W.3d 869 (2001). Because the determination of a preponderance of the evidence turns on questions of credibility and the weight to be given testimony, we defer to the trial judge's superior position to resolve those matters. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003).

We affirm the revocation of Medling's probation and grant counsel's motion to be relieved because an appeal based on the sufficiency of the evidence supporting the revocation

would be wholly frivolous.² The terms of Medling’s probation required her to report to her probation officer and to pay \$1,400 in fines. Medling admitted that she failed to report, and Marshall testified that she failed to report from December 2004-March 2005. While Medling asserted that she did not have transportation until April 2005, as the determiner of credibility, the trial court was not required to believe her testimony. *See Peterson, supra*.

Nor was the court required to believe her contradictory testimony that she “completely forgot” about her fines yet believed that the waiver of fees also meant that she was not required to pay her fines. *See Peterson, supra*. While these violations may be *de minimis*, such violations are sufficient to warrant revocation. *See Simmons v. State*, 13 Ark. App. 208, 681 S.W.2d 422 (1985).

Therefore, an appeal from the trial court’s revocation determination would be wholly without merit; further, an examination of the proceedings as a whole does not reveal any other issue that would provide a meritorious basis for an appeal.

Affirmed; motion to be relieved granted.

HART and BIRD, JJ., agree.

²The fact that Medling admitted to violating Arkansas’s Hot Check Law is not a basis for revocation because the State did not specify that as a ground in its petition; nor did the State move to amend the petition at the revocation hearing to include the violation of the Hot Check Law as a ground for revocation.

